IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODPUR
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:: O R D E R ::

S.B.CIVIL WRIT PETITION NO.928/2005-LALITA VS CIVIL JUDGE (JR.DIV.), UDAIPUR CITY (SOUTH) UDAIPUR & ORS UNDER ARTICLE 226 AND 227 OF THE CONSTITUTION OF INDIA.

DATE OF ORDER : 17.2.2005

PERSENT

REPORTABLE

HON'BLE MR. PRAKASH TATIA,J.

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Mr. Vikas Balia, for the petitioner.
Mr. R.K.Thanvi, for the respondents.

BY THE COURT:

Heard learned counsel for the parties.

The petitioner is aggrieved against the order dated 1.2.2005 by which the executing court in a petition filed under Order 21 Rule 97 CPC proceeded to decide; (i) whether the petition under Order 21 Rule 97 CPC be decided after allowing parties to lead oral evidence or (ii) whether the court should proceed to decide the petition finally on the basis of the material available on record and after hearing the parties. The executing court in detail order held that there is no need to allow the parties to submit oral evidence and the matter can be decided on

the basis of evidence already available on record, but after hearing both the parties.

The apprehension of learned counsel for the petitioner-objector is that the executing court without finding out what are the issues involved in the dispute held that there is no need to allow evidence of the parties and thereby the executing court has judged the matter without formulating any point for determination, which was necessary for conclusion that whether the evidence is required for deciding the issues or not. According to learned counsel for the petitioner after order dated 1.2.2005 since the court has fixed the case for final arguments, therefore, in view of the reasons given in the impugned order, the petitioner's all rights, available under the provisions of Civil Procedure Code like submitting the more affidavits and documentary evidence and of seeking permission from the court to cross-examine opponent's witness, have been taken away and that too, as stated above, without formulating the point for determination. According to learned counsel for the petitioner even from the order, it clearly appears that the executing court proceeded to hold that only point involved in the matter is whether the rent deed was executed or not between the parties and by implications of all the petitioner's objections.

Learned counsel for the petitioner submits that the effect of any order passed in the proceedings under Order 21 Rule 97 CPC is that it will determine the petitioner's right, title and interest in the property once for all and finally. It is also submitted that though the order passed on application under Order 21 Rule 97 CPC itself is not a decree, but the effect of the order is the same as of decree. Therefore, according to learned counsel for the petitioner, such an important issue cannot be permitted to be decided by the courts without permitting the parties to prove their case or prove the case by cross-examining the opponent's witnesses or by destroying the case of opponent by cross-examination of opponent's witnesses.

Learned counsel for the respondent submits that this court in the case delivered in Sri Vaishnav Brahmin Trust, Jodhpur Vs. Ramesh Chandra & Ors reported in RLW 2000(4) Raj. 273 considered the matter in detail and after following the law laid down by the Hon'ble Apex Court in various cases held that “the objection can be and should be determined on the basis of affidavits filed by the respective parties and documents that may be submitted”. It is also submitted that this court (by me) in S.B.Civil Revision Petition No.396/2002-Smt. Jahoran Vs. Kalyanmal & Anr alongwith connected revision petition, by order dated 19th August, 2003, also upheld the procedure adopted by the executing court in the proceedings under Order 21 Rule 97 CPC and upheld the

proposition that it is not necessary to even permit cross-examination of the deponent. According to learned counsel for the respondent, this court considered various judgments of this court as well as judgments of the Supreme Court and the judgment of this court delivered in the case of Sri Vaishnav Brahmin Trust,Jodhpur (supra).

I considered the submissions of learned counsel for the parties. It is clear from the first paragraph of the impugned order dated 1.2.2005 itself that the executing court considered the question whether the petition under Order 21 Rule 97 CPC be decided after taking oral evidence of the parties or can be decided only on the basis of the material available on record. The issue before the executing court was not whether to grant permission to any of the parties to cross-examine the deponent of the affidavits of opponent. It is true that there may be some impression that by this order, the executing court has once for all decided that no permission can be granted to any of the parties to cross-examine the deponent whose affidavits are already on record. The court only decided that court will proceed to decide the matter on the basis of material on record. Meaning thereby on the basis of the documents, which are placed on record by both the parties including the affidavits. This court in the case of Sri Vaishnav Brahmin Trust, Jodhpur (supra) held that objection petition under Order 21 Rule 97 CPC can be and should be determined on the basis of the affidavits filed by the

respective parties and documents that may be submitted. None of the judgment referred above, declared that no permission in any case can be granted to any of the parties to cross-examine the deponent. Rather, the Hon'ble Supreme Court in the case of Silverline Forum Pvt. Ltd. Vs. Rajiv Trust & Anr reported in (1998) 3 SCC 723 held that executing court can decide whether the resister or obstructor is bound by the decree or not and while considering this controversy, the Hon'ble Supreme Court held that adjudication need not be based on detailed enquiry or evidence but, if deemed necessary, the court can require adduction of evidence. The discretion has been left to the executing court to decide how to proceed and, therefore, the executing court has to exercise its discretion in accordance with law only and the above decision is not a decision laying down that in no case the executing court can permit oral evidence or the executing court will have to decide the matter on the basis of only affidavits and by not affording any opportunity of cross-examination of deponents despite the fact that case is made out for cross-examination of deponent by the opposite party .

The affidavit in evidence may be filed with the leave of court to prove a fact and may be filed if it is permissible under law. How the affidavit is to be dealtwith is provided under Order 19 of the CPC. The Rule 1 of Order 19 CPC provides that any court may for sufficient reason

order that any particular fact or facts may be proved by affidavit. The proviso to Rule 1 of Order 19 is also very relevant, which is as under: -

> "Provided that where it appears to be Court that either party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit."

In such situation,the court may permit the oral evidence. Rule 2 of Order XIX is as under: -

> "**2.Power to order attendance of deponent for cross-examination.-**(1) Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent.
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> (2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court or the Court otherwise directs."

The Rule 2 of Order 19 CPC clearly provides that the court enjoined a power to order permitting the cross-examination of the deponent upon the application submitted by the party. Therefore, when the executing court decides to decide the matter on the basis of the affidavit that does not mean that power of the executing court under Rule 2 of Order 19 CPC has been taken away, expressly, impliedly or by interpreting any of the judgment relied upon by learned counsel for the respondent. At this stage, it may be emphasized that it is for

the court to decide whether in the facts of the case, the cross-examination be allowed or not and this discretion should be exercised judicially. This court in the judgment of Smt. Jahoran (supra), relied upon by learned counsel for the respondent, observed as under:

> "It is clear that the court is not under an obligation to summon the witnesses simply because there is an application and prayer for summoning the witnesses for cross-examination. The petitioner is required to make out a case for summoning the witnesses for cross-examination and for that purpose he is required to show not only cogent reasons for summoning the witnesses but also to show his bonafides." (Emphasis supplied)

In view of the above the contention of learned counsel for the respondent is that the court has decided to decide the matter on the basis of the material available on record and has not closed the right of the petitioner to take steps, which the petitioner can take in accordance with law, therefore, the writ petition deserves to be dismissed only on this count.

It is true that the petitioner has challenged the order dated 1.2.2005 and has reasonable apprehension that now the executing court in the light of the decision dated 1.2.2005 shall decide the petition of the petitioner under Order 21 Rule 97 CPC on the basis of the material available on record only and by order dated 1.2.2005 itself by fixing the case for final arguments impliedly closed all the rights of the petitioner

to take steps even in the light of the decisions,which are relied upon by learned counsel for the respondent wherein this court held that it is for executing court to decide whether any case is made out for the cross-examination of the deponent or not. Not only this, but this court in various cases cautioned that unless and until a case is made out for permitting cross-examination the court should not allow cross-examination of the deponent. In the case of Smt.Jahoran (supra) also the order of disallowing the cross-examination of the witnesses was upheld by this court (by me) also, but it was because of the facts of that case only and is not an authorization to deny cross-examination of deponent in all cases.

So far as contention of learned counsel for the petitioner that the trial court has committed serious error of jurisdiction in passing the order and without determining the issues involved in the lis between the parties fixed the case for arguments. The plea is not without basis . Every point raised, rebutted and controverted by other party can be decided properly if proper point for determination are formulated. Normally in the Misc. proceedings, not formulating the point for determination itself may not be illegality and may not even be irregularity, which depends upon the facts of the each case. The court if frames the point for determination, it will always serve the cause of justice as not only parties, but the court will also be in control of the

proceedings. In this case, since the only point has been decided by the executing court, which in fact, only a decision of the executing court not allowing the parties to lead oral evidence and the court decided that the court will decide the petition on the basis of the material available on record, therefore, the executing court's decision is concerned, no fault can be found and there appears to be no reasonable basis to hold that the trial court will not permit the petitioner from submitting appropriate application for appropriate relief and the trial court will not decide the application in accordance with law and after hearing both the parties including granting relief to cross-examine etc.

In view of the above observations, the writ petition of the petitioner is dismissed. However, the executing court is directed to decide the mater expeditiously.

(Prakash Tatia), J.

c.p.goyal/-